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2009 DEC 18 AM 11:44

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BY: N. Seguir

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR20081339

Division 6

**DEFENDANT'S *IN LIMINE*
MOTION TO EXCLUDE POLICE
OFFICERS FROM TESTIFYING
AS EXPERTS**

Pursuant to Rules 15, and 16 of the Arizona Rules of Criminal Procedure, due process, and the Arizona and U.S. Constitutions, Defendant Steven DeMocker hereby moves *in limine* for an order precluding Sheriff's Officers or Detectives from testifying as experts at trial. This Motion is supported by the Due Process and Eighth Amendment clauses of the United States Constitution and counterparts in the Arizona Constitution, Arizona Rules of Evidence, Arizona Rules of Criminal Procedure and the following Memorandum of Points and Authorities.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **BACKGROUND**

3 The State has identified three computer forensic experts in its disclosures.
4 Although Detective Steve Page has not been identified as an expert by the State, the
5 State relied on Detective Page to offer opinions relating to forensic computer
6 examinations at prior hearings where the rules of evidence were not stringently applied.
7 Detective Page is not qualified and has not been designated as an expert by the State.
8 His opinions should be precluded by this Court.

9 Likewise, the State has not identified Detective John McDormett as an expert.
10 However, at prior hearings, the State has relied on Detective McDormett to offer
11 opinions on a variety of matters for which he is not qualified as an expert. This Court
12 should preclude "expert" opinion testimony by Detective McDormett.

13 Lastly, Officer Doug Brown has not been identified as an expert by the State and
14 is not so qualified, although the State has previously relied on Officer Brown to offer his
15 unqualified opinions on a variety of matters.

16 All other officers and detectives' testimony should be limited by the Arizona
17 Rules of Evidence 701.

18 **ARGUMENT**

19 **I. An Expert Must Be Qualified to Testify About the Subject Matter of**
20 **His Opinions.**

21 "[T]he trial court determines in each case 'whether the expertise of the witness is
22 applicable to the subject about which he offers to testify.'" *Gemstar, Ltd. v. Ernst &*
23 *Young*, 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996) (quoting *Englehart v. Jeep Corp.*,
24 122 Ariz. 256, 258, 594 P.2d 510, 512 (1979)). To qualify to testify as an expert
25 witness, the witness must possess expertise that is applicable to the subject about which
26 he intends to testify, and he must have training or experience that qualifies him to render
27 opinions which will be useful to the trier of fact. *Webb v. Omni Block, Inc.*, 216 Ariz.
28 349, 352, 166 P.3d 140, 143 (App. 2007). The party offering expert testimony must

1 show that the witness is competent to give an expert opinion on precise issue about
2 which he is asked to testify. *Gaston v. Hunter*, 121 Ariz. 33, 51, 588 P.2d 236, 344
3 (App. 1978). An expert will be excluded if he (1) has no relevant training or
4 experience, (2) does not detail the basis for his opinions and conclusions, and (3) does
5 not establish that his opinions and conclusions were based on data that was reasonably
6 relied upon by experts in field. *Holy Trinity Greek Orthodox Church v. Church Mut.*
7 *Ins. Co.*, 476 F.Supp.2d 1135, 1139 (D. Ariz. 2007) (witness did not qualify as expert,
8 for purposes of giving an affidavit in opposition to summary judgment in bad faith case
9 against property insurer regarding insurance claims handling practices).

10
11 **II. Neither Detective Page Nor Detective McDormett Nor Officer Brown**
12 **Qualify as Experts in the Areas About Which the State has Previously**
13 **Elicited Testimony From Them.**

14 At the *Simpson* hearing on December 23, 2008, Detective Page testified that he
15 had "completed several courses" in computer forensics (Tr. at 137:2-7) and then
16 proceeded to offer opinions about the forensic examination of Mr. DeMocker's
17 computers. He likewise testified on February 6, 2009 in front of the Grand Jury as to
18 his "forensic analysis" of Mr. DeMocker's computer. (Tr. at 113-136) Detective Page
19 testified to the grand jury that "[w]hat I have been able to determine is that none of the
20 files in 'my documents' folder, that's the folder where we keep all other documents,
21 whatever we work on the computer, none of those files were affected or touched on July
22 8th." (GJ 129:3-7). Again on October 28, 2009 Page testified about his "forensic
23 examination" of digital evidence including examination results of "keyboard searches,"
24 EnCase reports and "NetAnalysis" examinations. (Tr. at 74-141).

25 Detective Page is not a qualified computer forensic expert. He testified at the
26 *Chronis* hearing that his training in this area consists entirely of two courses by the
27 "National White Collar Crime Center" and courses on software used for computer
28 examination. (Tr., 10/28/09 at 75-76) He is not qualified to offer expert opinions in this

1 area. Furthermore, the State has identified three experts in this area and such testimony
2 by Detective Page would be duplicative.

3 Additionally, Detective Page's testimony, as well as the testimony of the other
4 three computer forensic experts identified by the State, is not relevant and should be
5 excluded. Counsel made a relevance objection to Detective Page's testimony on these
6 matters at the *Chronis* hearings. The State responded that this testimony "pertains to the
7 Aggravator No. 13-703(F)(13). The offense was committed in a cold, calculated manner
8 without pretense of moral or legal justification." (*Id.* at 81:15-18). The Court
9 overruled the objection "for purposes of the evidence being possibly useful for 13-
10 703(F)(13)." (*Id.* at 82:1-3). Given the Court's order that the State does not have
11 probable cause to allege the F(13) aggravator, this evidence is not relevant to any
12 remaining issue in the case and should be excluded. Even if the Court determined that
13 this evidence is somehow relevant to the issues remaining in the case, this evidence
14 should be excluded on the grounds of Arizona Rule of Evidence 403.

15 On October 31, 2008 Detective McDormett testified to the first Grand Jury that
16 the scene had been "staged," (GJ14:21-22) the body "repositioned" (GJ14:22-23) and
17 about his opinions about blood spatter on a bookshelf at the scene (GJ15:2-17). He
18 further testified about bike tire impression comparisons (GJ18:14-16), about the force of
19 the blows to Ms. Kennedy (GJ30:12-14), the direction the blows were made by the
20 attacker (GJ30:5-12), that the attack indicated "rage" of the attacker (GJ30:15-19), that
21 rage is suggestive of a relationship between victim and attacker (GJ30:19-20), that Ms.
22 Kennedy was attempting to reason with her attacker (GJ31:2-5), about Mr. DeMocker's
23 alleged "tax fraud," (GJ35:17-19; GJ56:3-15; GJ66:15-24) that Mr. DeMocker's
24 response to learning of Ms. Kennedy's death was "odd," (GJ53:20-25) and that a golf
25 club would be intact after inflicting the trauma Ms. Kennedy suffered (GJ49:10-22).
26 Also, at the *Simpson* hearing on December 23, 2008, Detective McDormett testified that
27 the injuries Ms. Kennedy suffered suggested that this was a "rage" killing and that "rage"

1 is generally associated or can be associated with somebody familiar with the victim.”
2 (Tr. at 124:20-23) Detective McDormett also testified the *Simpson* hearing about the
3 similarity or consistency of tire tracks at the scene and Mr. DeMocker’s bike. (*Id.* at
4 104:22-24.)

5 Detective McDormett is not an expert on crime scene analysis, blood spatter,
6 psychology, tax fraud or materials resilience. His training as a homicide detective is
7 limited to, as he testified, “basic homicide school, a buried body class” and “FBI classes
8 relating to profiling and things of that nature.” (*Id.* at 6:14-16.) Detective McDormett
9 is not qualified to offer expert opinions on the variety of topics he has previously and
10 without foundation freely speculated about and this testimony should be precluded by
11 this Court.

12 Officer Doug Brown testified at length about the DNA evidence in the case at the
13 first grand jury. He described results as “inconclusive” (GJ63:7-10) and failed to tell
14 the first grand jury about significant exculpatory DNA.¹ Officer Brown also testified to
15 the first grand jury that there was evidence from a forensic accountant that money was
16 being hidden by Mr. DeMocker (GJ67:7-9). At the second grand jury Officer Brown
17 testified at length about the DNA evidence. Again he misrepresented and omitted
18 results. For example he testified several times that male DNA was **not** found on the
19 phone. Brown testified that Sorenson Labs, “[d]id not identify the presence of the male
20 chromosome” (GJ 57:14-15). He also testified that “DPS original testing of the items
21 did not detect the male chromosome. When sent to Sorenson, it did not detect male
22 chromosomes.” (GJ 58:5-7). Detective Brown further testified that the results from the
23 phone were “inconclusive.” He also gave misleading and confusing testimony about the
24 DNA on the light bulbs. Detective Brown suggested to the grand jury that Mr.
25 DeMocker’s DNA and fingerprints were found at the victim’s house. (GJ 62:19-22).

26 ¹ For example, although he testified about DNA results from a blood on this door Officer Brown failed to inform
27 the grand jury that there was an unknown male’s DNA found in the blood on this door handle. Likewise he did
28 not tell the first grand jury that there was unknown male DNA found on light bulbs in the laundry room although
he told the grand jury it was “inconclusive as to anyone suppose [sic] to be at the house.” (GJ63:7-10).

1 Mr. Mark Ainley also asked Detective Brown, "Mr. DeMocker's DNA and fingerprints
2 were not found at Ms. Kennedy's house" and Detective Brown responded exactly as the
3 Court found to be inappropriate with at the first grand jury, "I can't say that for sure
4 because of the inconclusive results." (*Id.*) Officer Brown also testified about bike and
5 tire tracks, testifying that the front tracks "appeared identical" and when pressure was
6 placed on the rear tire "to flatten out the airless tire," "it again appeared identical." (GJ
7 45:15-19). Further, Officer Brown was asked by Mr. Ainley about wounds on the
8 victim and to speculate on a weapon. "This indentation that you see on her arm right
9 here, if you take this club and rotate it up, does it fit into this indentation?" Detective
10 Brown speculated as he was asked to do by Mr. Ainley, "[i]t appears to fit with the
11 markings." (GJ 68:12-15). This testimony is unfounded prejudicial speculation without
12 a basis in fact. Also, Mr. Ainley asked Officer Brown to speculate about blood spatter,
13 asking if it is "[f]air to say the ladder would have had to have been brought in later?"
14 Detective Brown responded "[i]n that position later, yes." (GJ 25:17-19). This is after
15 he advised the grand jury that the ladder "should have had blood if the events happened
16 in that way with the ladder being during that and not afterwards." (GJ 25:7-16). At the
17 *Chronis* hearing on October 28, 2009 Officer Brown opined as to what weapons caused
18 the wounds on Ms. Kennedy's arms and opined that they were defensive wounds.
19 (October 28, 109 *Chronis* hearing transcript at 147:2-148:2). The State further
20 attempted to elicit Officer Brown's opinion that the wounds were consistent with a golf
21 club. (*Id.* 148:11-20), and that wounds matched the desk. (*Id.* at 159:18-19). At the
22 hearing on October 29, 2009 Officer Brown testified that the scene was "staged",
23 (October 29, 2009 *Chronis* hearing transcript at 13:14-15) and about his conclusions
24 based on blood spatter (*Id.* 15:19-25).

25 Office Brown is not an expert on DNA, forensics, tire or shoeprint impression
26 comparison, forensic pathology, blood spatter or crime scene reconstruction or analysis.
27 He has no forensic pathology training and no medical training of any kind. (October 28,

1 2009 *Chronis* hearing transcript at 149:3-14). Yet the State has repeatedly relied on
2 Officer Brown to provide opinions on these matters.

3 The kind of testimony offered by these witnesses is particularly troublesome.
4 The significance of misleading, incomplete testimony regarding forensic evidence was
5 highlighted in a groundbreaking report released earlier this year by the National
6 Academy of Sciences. The National Academy was directed by Congress to undertake
7 the study that led to the report. Scholars from the legal and scientific communities
8 heard evidence from federal agency officials, academics, federal, state and local law
9 enforcement officials, medical examiners, a coroner, crime laboratory officials,
10 independent investigators and defense attorneys, forensic science practitioners and
11 leaders of professional organizations. After over two and half years of study and
12 research, the National Academy recently released an exhaustive and fully documented
13 report entitled "Strengthening Forensic Science in the United States: A Path Forward."
14 <http://www.nap.edu/catalog/12589.html>. The Report detailed serious flaws in the
15 scientific reliability and reporting of forensic testing and suggested sweeping reform. It
16 found that "... if the scientific evidence carries a false sense of significance ... the jury
17 or court can be misled, and this could lead to wrongful conviction or exoneration. If
18 juries lose confidence in the reliability of forensic testimony, valid evidence might be
19 discounted, and some innocent persons might be convicted or guilty individuals
20 acquitted." See "Strengthening Forensic Sciences in the United States," at 1-2. The
21 Report contains a series of recommendations including standardized terminology and
22 reporting for forensic science investigations. Significantly, the Report found that use of
23 language describing conclusions and degrees of association in forensic testing "can and
24 does have a profound effect on how the trier of fact in a criminal or civil matter
25 perceives and evaluates scientific evidence." *Id.* at S-15.

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III. Limitations on Non-Expert Witnesses.

Arizona Rule of Evidence 702 provides that an expert may testify about a matter of “scientific, technical or other specialized knowledge” that will assist the trier of fact to understand the evidence or to determine a fact in issue. Ariz. R. Evid. 702. “The Rules of Evidence, and Rule 702 itself, erect barriers to admission of all opinion evidence: the evidence must be relevant, the witness must be qualified, and the evidence must be the kind that will assist the jury.” *Logerquist v. McVey*, 196 Ariz. 470, 489 ¶ 57, 1 P.3d 113, 132 (2000). Rule 702 permits a qualified witness to testify in the form of an opinion if it would assist the trier of fact to understand the evidence or determine a fact in issue. Ariz. R. Evid. 702; *Gemstar*, 185 Ariz. at 505, 917 P.2d at 234 (trial court has broad discretion when determining whether a witness is competent to testify as an expert).

Given the latitude under the Rules of Evidence relating to expert testimony, the Arizona Rules of Criminal Procedure require more extensive and demanding disclosure for experts than for lay witnesses. For example, pursuant to Rule 15.1(b) the State is required to identify its experts at its initial disclosure, to disclose “the results of physical examinations and of scientific tests, experiments or comparisons that have been completed” and under Rule 15.1(e), to disclose written reports, statements and examinations notes of experts upon request of the defense. Ariz. R. Crim. P. 15.1(b) and (e).

All other officers and detectives’ testimony should likewise be limited to non-expert testimony unless a specific officer or detective is qualified as an expert in a particular area. For example, Sergeant Dan Winslow, clearly not an expert in this area, conducted his own bike tire comparisons on July 3, 2008 at the scene which he failed to properly preserve for DPS expert analysis. In his report he opines, “these tracks appeared be identical to the initial tracks left in the sand” of the front bike tire tracks and then after applying some other pressure the rear tire, “it again appeared identical.”

1 (Bates 000026). This testimony was presented to the grand jury by Officer Brown even
2 though the DPS expert report of these supposedly "identical" bike tire impressions said
3 only that the tracks were similar but that "due to the limited clarity and proper scale in
4 the images a more conclusive association was not made." (Bates 000311). DPS also
5 indicated they could not verify if the rear tracks were made by a deflated tire. (Bates
6 No. 001943). Sergeant Winslow should be prohibited from offering opinions about the
7 bike tire comparisons for which he is not qualified. This rule should apply to all
8 officers and detectives.

9 Under Rule 701, when a witness is not an expert, his testimony is limited to
10 opinions or inferences which are "rationally based on the perception of the witness" and
11 "helpful to a clear understanding of the witness' testimony or the determination of a fact
12 issue." Ariz. R. Evid. 701. This is a significant distinction. Lay witnesses are limited
13 to matters they personally perceived and that helpful either to their testimony or to a fact
14 issue. Opinion testimony on whether the crime occurred, whether the defendant is the
15 perpetrator, and like questions is nothing more than advice to the trier of fact on how to
16 decide the case. Such testimony was not legitimized by Rule 704, and is not admissible
17 under Rule 702. *See State v. Moran*, 151 Ariz. 378, 383, 728 P.2d 248, 253 (1986); *see*
18 *also State v. Montijo*, 160 Ariz. 576, 580, 774 P.2d 1366, 1370 (Ariz. App. 1989). This
19 same rule is extended to preclude lay testimony for offering opinions on credibility or
20 advice to the jury on how to decide a case. *State v. Reimer*, 189 Ariz. 239, 242, 941
21 P.2d 912, 915 (1997) (reversible error to admit testimony of officer regarding
22 credibility).

23 The testimony of Detective Page and McDormett and any other officer or
24 detective should be limited according to Arizona Rule of Evidence 701.

25 CONCLUSION

1 For these reasons, Mr. DeMocker requests that this Court preclude the State from
2 offering expert testimony from Detectives McDormett and Page and from Sgt. Winslow
3 or any other officer who is not a properly qualified expert.

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5 DATED this 18th day of December, 2009.

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15 **ORIGINAL** of the foregoing filed
16 this 18th day of December, 2009, with:

17 Jeanne Hicks
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20 **COPIES** of the foregoing hand delivered
21 this 18th day of December, 2009, to:

22 The Hon. Thomas B. Lindberg
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